

Joint Select Committee on Australia's Family Law System

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Preface

The authors of this submission work at the Centre for Social Research & Methods (CSRM) at the Australian National University (ANU). We are pleased to have the opportunity to respond to the Joint Select Committee on Australia's Family Law System.

The Centre is located within the Research School of Social Sciences in the College of Arts & Social Sciences, ANU. The Centre, which was established in 2015, is a joint initiative between the Social Research Centre (SRC), an ANU Enterprise business, and the ANU. Its expertise includes quantitative, qualitative and experimental research methodologies, public opinion and behaviour measurement, survey design, data collection and analysis, data archiving and management, and professional education in social research methods. The Centre's research focuses on:

- The development of social research methods
- Analysis of social issues and policy
- Training in social science methods
- Providing access to data from the social sciences

Researchers within the Centre come from a range of disciplines including economics, econometrics, family law, political science, psychology, public health, social policy, sociology and statistics.

Bruce Smyth is Professor of Family Studies. For the past 25 years, he has been involved in numerous major studies of divorce and post-separation parenting (e.g., shared parenting; child support; spousal support; relocation and parenting disputes; financial living standards; allegations of family violence; binding financial agreements; mandatory divorce mediation; digital divorce) – including a recent study of high-conflict post-separation shared-time families.

Jason Payne is Deputy Associate Dean of Education in the College of Arts and Social Sciences, and Associate Professor of Criminology. He is a criminologist who specialises in developmental and life-course criminology, including child and adolescent victimization and offending. Jason is formerly a Research Manager at the Australian Institute of Criminology where he undertook a large number of Commonwealth-funded research projects, including the mixed-methodological study of the National Police Drug Diversion Initiative, the Queensland Drug Court program and the Tasmania Safe at Home program. Most recently, Jason has been leading the qualitative evaluation of the ACT's Domestic Violence Crisis Services Room4Change men's behaviour change program.

Marian Esler is a Research Fellow with decades of experience in research, policy and practice. In her previous roles in the Australian Public Service, she was responsible for commissioning, managing and contributing to major research and evaluation projects relating to families, family law and family violence. From August 2015 to October 2018, she was responsible for all the research and data activities under the National Plan to Reduce Violence against Women and their Children 2010–2022 (the National Plan), as well as capacity-building projects funded under the Third Action Plan to improve service responses to adults and children experiencing family violence.

The views expressed in this submission might not reflect those of our co-authors of prior work or any affiliated organisations involved in prior studies.ⁱ

ⁱ The authors are grateful to Professor Lawrie Moloney for comments on an early draft of this submission. Any shortcomings or errors, of course, are ours alone.

Terms of Reference

In this submission, we focus on the five Terms of Reference emboldened below:

- a. ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:
 - i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and
 - ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;
- b. the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders;**
- c. beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court;
- d. the financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:
 - i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and
 - ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;
- e. the effectiveness of the delivery of family law support services and family dispute resolution processes;**
- f. the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;**
- g. any issues arising for grandparent carers in family law matters and family law court proceedings;
- h. any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners;
- i. any improvements to the interaction between the family law system and the child support system;**
- j. the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes; and
- k. any related matters.**

Submission to the Joint Select Committee on Australia's Family Law System

Preamble: The value of empirical data

Family law is an area fraught with high personal emotion for many separating parents and family members. Value judgments about what constitutes 'fairness', highly technical legislation and rules, and intricate interactions between the family law system, the child support system, and tax and income transfer systems (particularly family payments) add additional layers of complexity. The 'big three' challenges – family violence, mental health issues, and drug and substance abuse – feature prominently in high-conflict cases in the litigating parent population. It is this mix of technical and structural complexity, raw emotion, and the often-disparate competing interests of resident and non-resident separated parents that make family law one of the most contested areas of public policy.

Family law is also an area in which anecdote often reigns supreme. This is because (a) it is easy to relate to personal stories and (b) empirical data are frequently lacking on pressing policy questions. Policy makers should be alive to the risk of an over-reliance on anecdotal evidence in the shaping of policy for a minority rather than for the majority, especially where the rationale behind legislation and/or policy decisions involve a complex set of issues that do not appear to be well understood by the community.

Good policy requires good data. Australia has invested a large amount of money and effort into the collection of data for evaluating family law and child support reforms (e.g., data on post-separation parenting collected by the Australian Institute of Family Studies, and the Australian National University). These data are some of the best data in the world for understanding the impacts of the family law system, and changes to it, on families. In the current tight fiscal environment, it makes much sense to make use of these data for informing the direction of policy.

The need for evidence-based policy development in the area of family law cannot be overstated. Elsewhere, Australia has invested significantly in research on family, domestic and sexual violence and we now have a much better understanding of their prevalence and impact. These data have helped shape a national conversation about violence against women and their children and have underpinned both state and federal action plans. The evidence is sobering, but this investment in research has not yet been systematically connected to the complex issues that beset the current family law system.

For example, the Personal Safety Survey (PSS) 2016¹ indicates that 1 in 6 women and 1 in 16 men have experienced physical and/or sexual violence by a current or former partner since the age of 15 years. If 'intimate partner' includes 'boyfriend/girlfriend/

¹ Australian Bureau of Statistics (2017). *Personal Safety, Australia, 2016* (Cat No. 4906.0): <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>

date', the rates become 1 in four women, compared with 1 in 13 men. The proportion of women who experienced partner violence in the previous 12 months has remained relatively stable over the last decade. In 2005, approximately 1.5% of women aged 18 years and over experienced partner violence in the previous 12 months, whilst in 2016 the figure was 1.7%. The PSS 2016 also indicates that 1 in 6 women (16% or 1.5 million women) and 1 in 10 men (11% or 991,600 men) aged 18 years and over experienced physical and/or sexual abuse before the age of 15.

Moreover, we know from recorded crime data² that female victims of assault were more commonly offended against by an intimate partner in all of the selected states and territories for which Assault and Relationship of Offender to Victim data are published, ranging from 64% in New South Wales and the Australian Capital Territory to 86% in Tasmania. Males were most commonly offended against by an intimate partner in Tasmania (76%), Northern Territory (52%) and South Australia (49%) and most commonly by another family member in the Australian Capital Territory (48%) and New South Wales (47%). It also appears that Family and Domestic Violence (FDV)-related sexual assault is increasing. There were 8,830 victims of FDV-related sexual assault in 2018, which accounted for a third (34%) of all victims of sexual assaults recorded nationally. This was the highest number of victims of FDV-related sexual assault recorded for the FDV since the beginning of the data series in 2014.

These data suggest that family and domestic violence remains a major problem in Australian families and are likely to be reflected in the relatively high incidence of violence accusations in family law proceedings.

For the present Inquiry, our hope is that recommendations made by the Committee are based on the best available data rather than the voice of any particular individual(s) or interest group(s). This is not to discount the value of any individual's personal experience with the family law system but to underline the importance of high-quality representative data for informing the direction of national policy.

² Australian Bureau of Statistics (2019). *Recorded Crime-Victims, Australia, 2018*, (Cat No: 4510.0) Victims of Family and Domestic Violence related offences:
<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2018~Main%20Features~Victims%20of%20Family%20and%20Domestic%20Violence%20related%20offences~6>

Reference (b): The appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders

The issue of one (or both) parent(s) making false allegations of family violence and/or child sexual abuse about the other parent in order to gain a strategic advantage in court has plagued the family law system in Australia and elsewhere for several decades.³ A common belief is that many parents – e.g., those harbouring a deep hatred of the other parent, those seeking revenge, and those seeking to turn children against the other parent (i.e., parental alignment or so-called ‘parental alienation’) – make such allegations to obtain full-time care of their children and to essentially end the child’s relationship with the other parent. In the North American context, it is increasingly common for high-conflict cases to involve child protection agencies, and for disputes over children’s matters and child protection proceedings to co-occur.⁴ The same appears to hold true in Australia – though here, child protection is state-based while family law is covered by the Commonwealth: a disjunct that allows some children to ‘fall through the cracks’ as each service seeks to push complex cases to the other jurisdiction.

In Canada, where much of the allegation research has been conducted, Bala and his colleagues noted that “a range of circumstances may lead to a parent making unfounded allegations of abuse after parental separation:

- allegations that are made in the honest but mistaken belief that abuse has occurred, often due to some misunderstanding or misinterpretation of events;
- allegations that are made knowingly with the intent to seek revenge or manipulate the course of the litigation; or
- allegations that are made as the result of an emotional disturbance or mental illness of the accusing parent.”⁵

Around the world, there is a paucity of reliable studies of false allegations of family violence and/or child sexual abuse in the context of parental separation. We briefly review these studies here. The key question, as asked by Jaffe, Johnston, Crooks and Bala, is: “What reliable evidence can be gleaned from the mutual finger pointing and counterblaming of a “he-said/she-said” variety?”

Early studies

³ The recent statement by the Hon Senator Pauline Hanson captures the flavour of this issue: “There are people out there who are nothing but liars and who will use that in the court system I am hearing too many cases where parents are using domestic violence to stop the other parent from seeing their children; perjury is in our system but they are not charged with perjury.” Available at: <https://www.theguardian.com/australia-news/2019/sep/18/pauline-hanson-sparks-fury-with-claims-domestic-violence-victims-are-lying-to-family-court>

⁴ Houston, C., Bala, N., & Saini, M. (2017). Crossover cases of high-conflict families involving child protection services: Ontario research findings and suggestions for good practices. *Family Court Review*, 55(3), 362-374.

⁵ Bala, N. M., Mitnick, M., Trocmé, N., & Houston, C. (2007). Sexual abuse allegations and parental separation: Smokescreen or fire?. *Journal of Family Studies*, 13(1), 26-56, at 37.

Much of the early work into “false” allegations of abuse in the context of parental separation was conducted in North America during the 1980s.⁶ These small-scale clinical studies – drawing on data from the private practices of psychiatrists who conducted clinical assessments for litigants, the court or child welfare agencies – focused primarily on allegations of child sexual abuse in custody disputes. These studies suggested that such allegations were on the rise, were largely false, and were made by mothers against fathers.⁷

For instance, Kaplan and Kaplan reported on a single case from their clinical practice (with a passing reference to one other similar case).⁸ The case was referred to them by a family court judge who wanted to determine whether allegations of sexual abuse made by a child in a custody dispute were “true”. Although no definitive assessment was offered, Kaplan and Kaplan implied that the allegations were unfounded, suggesting that the allegations stemmed from a folie à deux, in which several family members shared similar delusional beliefs.

In another frequently cited study, Benedek and Schetky examined 18 cases of alleged incest (14 of which were related to custody disputes after divorce) and concluded that 10 of these cases (55%) were based on “false” allegations.⁹ They suggested that although false allegations of sexual abuse by children and their parents are rare, such allegations were particularly likely to occur in custody disputes. They speculated that some parents might make false allegations “to obtain sole custody, to terminate visitation, to terminate parental rights, or to harass a non-custodial parent”.¹⁰

Green reported on 11 cases from his private practice in which the children, in the context of a custody or access dispute, claimed that they had been sexually assaulted by their non-resident father.¹¹ Green concluded that four of these cases (36%) involved false allegations of abuse, which, he suggested, mirrored Benedek and Schetky’s (1985) “strikingly high” rate of false allegations. (Green also suggested that false denials by children were “common”, whereas false allegations by children were rare.)

Moreover, Schuman described seven cases from his clinical practice in which child physical and sexual abuse were alleged.¹² He concluded that “all of the claims of abuse

⁶ This summary of studies draws heavily on work written by Smyth in a study of allegations of family violence and abuse in Australia. See: Moloney, L., Smyth, B., Weston, R., Richardson, N., Qu, L., & Gray, M. (2007). *Allegations of family violence and child abuse in family law children’s proceedings: A pre-reform exploratory study*. Canberra: Australian Institute of Family Studies. (Chapter 2, pp. 19–23).

⁷ Faller, K. C., & Devoe, E. R. (1995). Allegations of sexual abuse in divorce. *Journal of Child Sexual Abuse*, 4(4), 1–15; McGraw, J. M., & Smith, H. A. (1992). Child sexual abuse allegations amidst divorce and custody proceedings: Refining the validation process. *Journal of Child Sexual Abuse*, 1(1), 49–62; Thoennes, N., & Tjaden, P. G. (1990). The extent, nature, and validity of sexual abuse allegations in custody/visitation disputes. *Child Abuse & Neglect*, 14(2), 151–163.

⁸ Kaplan, S. L., & Kaplan, S. J. (1981). The child’s accusation of sexual abuse during divorce and custody struggle. *Hillside Journal of Clinical Psychiatry*, 3(1), 81.

⁹ Benedek, E., & Schetky, D. (1985). Allegations of sexual abuse in child custody and visitation disputes. In E. Benedek & D. Schetky (Eds.), *Emerging issues in child psychiatry and the law* (pp. 145–156). New York: Brunner/Mazel.

¹⁰ *Ibid*, at 156.

¹¹ Green, A. (1986). True and false allegations of sexual abuse in child custody disputes. *Journal of the American Academy of Child Psychiatry*, 25, 449–456.

¹² Schuman, D. (1986). False allegations of physical and sexual abuse. *Bulletin of the American Academy of Psychiatry and Law*, 14, 5–21.

were ultimately shown to be nonvalid”,¹³ and suggested that “domestic relations cases are unfortunately fertile ground for nonvalid perceptions and/or allegations of misconduct of all forms”.¹⁴

However, as several researchers have noted, small-scale clinical studies should be read and interpreted with caution. First, they typically have little generalisability because of their small and highly selective samples. The examination of low base-rate conditions, such as child sexual abuse, requires large samples for statistical power; and clinical case studies are not designed to estimate prevalence rates. Second, case studies might reflect a clinician’s own views about, and theoretical orientation towards, abuse, which can shape what has been described and concluded (“confirmation bias”). This is especially likely in the emotionally charged area of child custody proceedings in which there is pressure to reach a decision one way or the other. An apparent gender bias against mothers in this early work has not gone unnoticed.¹⁵ Third, clinicians in these early studies tended to categorise cases idiosyncratically rather than rely on empirically validated and consensually agreed observations.¹⁶

More problematic, perhaps, is that these early clinical studies employed a simple binary classification system to assess allegations (“true” or “false”), in which unsubstantiated allegations were treated as “false”. This is understandable given that a key aim of these studies was to try to identify clinical criteria that could distinguish between “true” and “false” reports.¹⁷ But, as several researchers have noted, allegations can remain unsubstantiated for many reasons, and there remains much confusion about definitional issues.¹⁸

For instance, Awad recommended that allegations be assessed as either “probably true”, “probably not true”, or “indeterminate” because it may be impossible in many instances to determine the veracity of an allegation with any certainty.¹⁹

Similarly, Penfold suggested that allegations be classified into one of three types: *substantiated* reports (variously termed “true”, “found”, “proved” or “confirmed”), *unsubstantiated* (or “unfounded”, “unproven” or “insufficient information”), and *false* (or “fictitious”, “erroneous” or “manufactured”).²⁰

More recently, Trocmé and Bala²¹ emphasised the importance of distinguishing unsubstantiated investigations from “intentionally false” reports:

¹³ Ibid, at 6.

¹⁴ Ibid, at 19.

¹⁵ Corwin, D., Berliner, L., Goodman, G., Goodwin, J., & White, S. (1987). Child sexual abuse and custody disputes: No easy answers. *Journal of Interpersonal Violence*, 2(1), 91–105.

¹⁶ Ibid.

¹⁷ Thoennes & Tjaden: above n 7.

¹⁸ Trocmé, N., McPhee, D., Tam, K. K., & Hay, T. (1994). *Ontario incidence study of reported child abuse and neglect*. Toronto, Canada: Institute for the Prevention of Child Abuse.

¹⁹ Awad, G. A. (1987). The assessment of custody and access disputes in cases of sexual abuse allegations. *Canadian Journal of Psychiatry*, 32, 539–544.

²⁰ Penfold, P. S. (1995). Mendacious moms or devious dads? Some perplexing issues in child custody/sexual allegations. *Canadian Journal of Psychiatry*, 400, 337–341.

²¹ Trocmé, N., & Bala, N. (2005). False allegations of abuse and neglect when parents separate. *Child Abuse & Neglect*, 29, 1333–1345, at 1335.

Most unsubstantiated investigations are the result of well intentioned reports triggered by a suspicious injury or concerning behavior or a misunderstood story. Mandatory reporting laws require the reporting of *reasonably suspected* child abuse or neglect, and do not expect reporters to conduct their own investigations prior to reporting. In contrast to unsubstantiated allegations, intentionally false allegations are intentional fabrications that are made in the hope of manipulating the legal system, or made to seek revenge against an estranged former partner, or may be the product of the emotional disturbance of the reporter. If there is a deliberate fabrication made, it is important to distinguish between cases in which a parent or other adult who is taking the lead in the fabricating from those where it is the child who is fabricating the allegation without adult influence.

It is also important to distinguish allegations that are clearly unsubstantiated or false, from those where abuse cannot be substantiated but remains suspected (*italics in original*).

Trocmé and Bala have since adopted a four-category classification scheme in which allegations were classified as (a) “substantiated”, (b) “suspected”, (c) “unsubstantiated, [in] good faith”, or (d) “intentionally false”. They suggest that confusion often arises in the interpretation of allegation statistics because of a lack of conceptual or definitional clarity. For instance, Thoennes and Pearson defined “false” allegations as those “offered in good faith, but where, for a variety of reasons, the abuse was unlikely”²², whereas Trocmé and Bala would define these as “unsubstantiated, good faith”. The issue of conceptual clarity remains fundamental to understanding the literature on false allegations in the context of parental separation. Binary true–false approaches to classification risk oversimplifying the typically complex nature of allegations.

Other relevant studies

In Canada, Shaffer and Bala (2003) sought to examine the circumstances in which, and under what terms, abusive husbands were being allowed parent–child contact by the court.²³ They also wanted to assess the extent to which judges believed claims by women of “wife abuse”. They conducted a search of children’s matters reported in the Canadian family law database, Quicklaw, which produced 42 cases in which wife abuse was likely to have been a consideration in a custody or access dispute.

Shafer and Bala noted that that the court found women’s allegations to be exaggerated or unsubstantiated in 11 of the 42 cases examined:

In some of these cases, the court gave no reasons for concluding that the women had fabricated or embellished their claims, making the validity of these judicial decisions impossible to assess. It is possible that the courts were correct and the claims had been fabricated or exaggerated. It is also possible, however, that judges failed to recognize abuse because it was not well documented or because the abuse took a predominantly emotional, rather than physical, form.

²² Thoennes, N., & Pearson, J. (1988). Summary of findings from Sexual Abuse Allegations Project. In B. Nicholson & J. Bulkey (Eds.), *Sexual abuse allegations in custody and visitation cases*. Washington, DC: National Legal Resources Center for Child Advocacy and Protection, at 23.

²³ Shaffer, M., & Bala, N. (2003). Wife abuse, child custody and access in Canada. In R. A. Geffner, R. S. Igelman, & J. Zellner (Eds.), *The effects of intimate partner violence on children* (pp. 253–276). New York: Haworth Maltreatment & Trauma Press, at 259–260.

In the absence of medical records, police reports or witnesses to the abuse, judges may have difficulty finding that abuse occurred, and in fact, judges mention this as a problem in some of the cases. In part this may be a function of the law's requirement that the person making an allegation of abuse prove it true on the balance of probabilities. ... Often the only adult witnesses to spousal abuse are the spouses. While children often see or hear spousal abuse, there are a variety of evidentiary and ethical concerns about calling them as witnesses. Many women do not disclose their abuse, report it to doctors, or call the police; therefore, it may be difficult to prove abuse in many cases. Absent evidence corroborating the women's allegations, judges may be reluctant to find that abuse has been proven to the court's satisfaction. Judges may decide the allegations are "unfounded" simply because the woman cannot muster sufficient evidence that it has occurred.

Judges may also conclude that allegations are unfounded where women raise allegations of emotional or verbal abuse as involving significant physical violence. If the abuse is primarily emotional or verbal, courts may have difficulty conceptualizing the conduct as abusive, viewing it instead as mutual conflict or discord.²⁴

In 2007, Bala and his colleagues drew on national data from child protection agencies on false allegations of child abuse.²⁵ These data were collected as part of the 2003 Canadian Incidence Study. Bala et al found that for the general population: of all reports of child abuse and neglect made to child protection agencies (N=11,562), almost half (49%) were viewed as substantiated; "13% were suspected; 27% were unsubstantiated but made in good faith, and **4% were considered to be intentionally false**" (emphasis added). Of the latter (n=512), non-resident parents (mostly fathers) were more likely to make intentionally false allegations than were resident parents (mostly mothers); fathers typically falsely alleged child neglect, where as mothers typically falsely alleged child sexual or physical abuse.

In the context of ongoing high-conflict over parenting matters post-separation, **14% were considered to be intentionally false (of these, 27% were made by resident parents; 34% by non-resident parents; 39% by relatives or neighbours).**²⁶

In a recent study of 210 reported judicial decisions from Ontario between 2010 and 2015 involving a post-separation parenting dispute and report to Child Protection, Houston, Bala and Saini found that mothers and fathers were about equally likely to allege abuse or neglect (mothers: 27%; fathers: 26%).²⁷ According to Houston et al: **"in only 2% of the cases did a child protection worker testify that they believed the report of abuse or neglect was made maliciously or to gain tactical advantage"** (emphasis added).²⁸

Unfounded allegations of family violence and abuse

²⁴ Ibid, at 259–260.

²⁵ Bala et al., above n 5.

²⁶ Ibid. Saini et al (2013) reported similar figures.

²⁷ Houston, C., Bala, N., & Saini, M. (2017). Crossover cases of high-conflict families involving child protection services: Ontario research findings and suggestions for good practices. *Family Court Review*, 55(3), 362–374.

²⁸ Ibid, at 365.

While allegations of family violence and abuse have for some time represented the core business of the court,²⁹ the other side of the coin cannot be ignored – that a sizeable proportion of allegations cannot be substantiated.³⁰ Clearly there is a diverse array of potential sources of misunderstanding and suspicions of abuse in high-conflict cases and among families where violence is present that need to be acknowledged.

To begin with, a proportion of these allegations may be valid disclosures that simply lack convincing evidence to substantiate them.³¹ Most family violence, of course, occurs behind closed doors; tends not to be reported; often involves shame and denial by the person experiencing violence; “or is normalized, excused, and rationalised within some families and cultures...”³²

Second, as just outlined, several studies suggest that only a small percentage of unfounded child abuse allegations are due to deliberate or malicious fabrication.

According to Jaffe et al:³³

More commonly, the accusing parent has an honestly held (albeit erroneous) belief about the abuse. Suspicions of child abuse, especially for young children during visitation, may arise from distressed behavior of the child of ambiguous origin or relatively benign incidents that are misreported to parents who are no longer communicating with one another. Where parents harbor fear, distrust, and negative convictions about one another, the potential for such misunderstanding is greatly increased. Such distortions are too often reaffirmed by family, friends, and even professionals in a world now split in two, sometimes generating a form of tribal warfare within an adversarial legal system focused on finding fault...

There is virtually no research on the extent to which spousal abuse allegations are clearly false and maliciously fabricated, but this issue is becoming an increasing concern for the justice system. An unintended negative consequence of bringing social and statutory attention to the relevance of domestic violence in child custody determinations is the possibility of encouraging fabrication, or more commonly exaggeration and biased recall in reporting events, in order to support legal claims and to access services and social supports.... On the other hand, it is critical to emphasize that the making of false allegations of spousal abuse is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimization of abuse by perpetrators....

Canadian data suggest that false denials are more prevalent than false allegations.

One of the emerging practical issues in this complex area is that often both parents call in child protection to “take sides” in high-conflict cases, with claims of family violence, drug use, neglect, excessive corporal punishment, emotional abuse with subsequent counter-allegations (often buttressed by technologically mediated communication

²⁹ Moloney et al: see above n 4.

³⁰ Jaffe, P. G., Johnston, J. R., Crooks, C. V., & Bala, N. (2008). Custody disputes involving allegations of domestic violence: Toward a differentiated approach to parenting plans. *Family Court Review*, 46(3), 500-522.

³¹ Moloney et al: see above n 4.

³² Jaffe et al: see above n 30, at 508

³³ Ibid.

tools).³⁴ Although some “false allegations” are made, the raising of any allegation should be seen as a red flag for children’s wellbeing, and the role of a forensic investigation buttressed by the potential involvement of child protection warrants consideration.

Reference (e): The effectiveness of the delivery of family law support services and family dispute resolution processes

In July 2006, sweeping changes to the Australian family law system were introduced to reduce parental conflict and encourage shared parenting.³⁵ One aspect of the suite of changes of particular interest to policymakers and family law professionals is the introduction of mandatory family dispute resolution (FDR) as a pre-condition to initiating court proceedings in parenting matters – with exceptions (e.g., family violence or child abuse). Specifically, separated parents seeking a court listing are now required to obtain and present to the court a section 60I certificate. This certificate demonstrates either that mediation has been attempted but was unsuccessful, or that parties have attempted to participate in mediation but the dispute is deemed by practitioners to be inappropriate for mediation. Since the introduction of mandatory mediation in 2006, little empirical research into the process of issuing s. 60I certificates, and the dispute resolution trajectories of separated parents who receive a certificate, has been undertaken.

The stated object of section 60I of the FLA is to ensure that all persons who have a dispute about children’s matters ‘make a genuine effort to resolve that dispute by family dispute resolution’ before an application can be made for an order under Part VII of the FLA (the Part that deals with children). The legislative method was to provide that unless one of a number of exceptions apply, parties cannot commence proceedings for orders relating to children unless they have filed a certificate issued by a Family Dispute Resolution Practitioner (FDRP) relating to the parties’ participation in dispute resolution.

There are five different categories of certificate that can be issued by an FDRP. The full description of each category of certificate is set out in section 60I(8) of the FLA. They may be paraphrased³⁶ as a certificate verifying that the person:

1. did not attend family dispute resolution, but this was because another party (or parties) to the dispute refused or failed to attend¹ (‘failure or refusal to attend’ certificate);
2. did not attend family dispute resolution because the FDRP considers that it would not be appropriate to conduct family dispute resolution² (‘inappropriate for FDR’ certificate);
3. attended family dispute resolution and all attendees made a genuine effort to resolve the dispute³ (‘genuine effort’ certificate);
4. attended family dispute resolution and that one or more of the attendees did not make a genuine effort⁴ (‘not genuine effort’ certificate);

³⁴ We are grateful to Professor Nick Bala for sharing this insight.

³⁵ This section draws heavily on: Smyth, B., Bonython, W., Rodgers, B., Keogh, E., Chisholm, R., Butler, R., ... & Vnuk, M. (2017). *Certifying mediation: a study of section 60I certificates* (No. 2, p. 2017). CSRM Working Paper. Canberra: ANU.

³⁶ We are indebted to Professor Richard Chisholm AM for paraphrasing the legislation here.

5. began attending family dispute resolution, but the practitioner considers it would not be appropriate to continue with family dispute resolution⁵(‘no longer appropriate for FDR’ certificate).

In 2016, a study was commissioned by Interrelate with the financial support of the Australian Government Attorney-General’s Department, which co-funded the study. The research team comprised staff from the ANU (Smyth, Rodgers, Keogh & Chisholm), the University of Canberra (Bonython), and Interrelate (Butler, Parker & Stubbs). The study was designed to explore elements of the operation of the certificate-issuing process created by s. 60I of the Family Law Act 1975 (Cth) (‘FLA’). Specifically, it sought to explore: (a) the number and categories of certificates issued, and the characteristics of those clients who do and do not receive them; (b) the factors and circumstances influencing the decision of Family Dispute Resolution Practitioners (FDRPs) to issue different categories of s. 60I certificates; and (c) clients’ understanding of the purpose of the certificate, and the various dispute resolution pathways (if any) used by families after receiving a s. 60I certificate.

Smyth, Bonython, Rodgers, Keogh, Chisholm, Butler, Parker, Stubbs, Temple & Vnuk concluded that it is:

... a complex matter to say whether the s. 60I certificate process is working well, and precisely what changes might be needed to improve it. The data from the present study suggest that a decade after implementation, a number of unresolved questions nonetheless remain about the role of s. 60I certificates. Perhaps the most fundamental is to identify the purpose of the different categories of certificate. The findings of this study suggest that those whose task it is to issue certificates, the FDRPs, cannot readily glean the purpose from the legislation and guidelines available to them. In particular, while there are some indications that the purpose is to provide useful information to the court, this is not the stated purpose of s. 60I and there is no provision for the certificate to be admitted into evidence. Once this purpose is identified, it might be possible to address some of the more specific issues that arise, including the following:

- Should the legislation require that a certificate be issued to everyone who participates, or attempts to participate, in FDR?
- Are the five categories of certificate useful?
- Is the wording of the ‘refusal or failure to attend’ clause of the certificates clear?
- Can the certification system be improved for families with complex needs, and for the family law system more broadly?
- Can FDRPs be better supported in issuing s. 60I certificates?
- What can be done to help disputing parents who do not appear to have the financial resources to pursue litigation?
- Do judicial officers make use of the s. 60I certificates in any way? Should they?

Smyth et al suggested that several lines of inquiry warrant further investigation:

- an analysis of national administrative data on s. 60I certificates;
- replicating both client survey and FDRP interviews with national random samples of clients (including those who did not receive a s. 60I certificate) and practitioners;

- expanding the research design to include interviews with lawyers to clarify legal professionals' advice about obtaining, and views towards, s. 60I certificates; and
- a formal study of judicial practice in the use of s. 60I certificates.

Reference (f): The impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings

Considered from the perspective of children and the family as a whole, it is rare to find 'winners' in adversarial legal processes. These processes frequently erode the parental alliance, and the ability of parents to develop a cooperative or even business-like working relationship as parents. Children can suffer as a consequence, especially in the context of ongoing high-conflict or inter-parental hatred.

Our colleague and collaborator, Professor Lawrence Moloney, has recently argued that many parenting disputes that reach the family law courts should not be there.³⁷ He has recommended a two-track system that distinguishes 'commonplace' (or non-forensic) cases from 'potentially dangerous (or forensic) or otherwise urgent' cases (see his submission). For Moloney, good family law practice should seek, "wherever possible, [a] to resolve those 'commonplace' disputes that require intervention through facilitated processes that are timely, fair, respectful, collaborative (rather than adversarial) and modestly priced [; and (b)] [t]o provide timely, fair and safe arbitration of disputes in cases that are potentially dangerous and/or urgent or financially complex". We agree. Interpersonal conflicts that remain unresolved or escalate can be corrosive, highly destructive, and dangerous.

We believe the family law system remains under-resourced, especially regarding the ability of the family law courts to forensically investigate potentially dangerous and/or urgent cases. For instance, Professor Moloney and I have argued that a small but significant number of cases (<5%) consume an inordinate amount of resources.³⁸ In the USA, it has been estimated that 10% of cases in the "high-conflict" category takes up 90% of family law courts' and professionals' time.³⁹ We have suggested that some cases identified as being in chronic high conflict might actually reflect a more fundamental and potentially destructive dynamic—namely hatred by one (or both) parent(s) toward the other, especially entrenched interparental hatred. Even small reductions in the prevalence of this group can result in large gains in outcomes, time, and effort—and ultimately free up valuable resources.

But high-conflict cases – including deep hatred – are often complicated by the intersection of several overlapping and mutually reinforcing areas of complexity:

³⁷ Moloney, L. (2019). Parenting disputes after separation and divorce: Who needs a family lawyer? *Australian and New Zealand Journal of Family Therapy*, 40(1), 43-61.

³⁸ Smyth, B. M., & Moloney, L. J. (2017). Entrenched postseparation parenting disputes: The role of interparental hatred? *Family Court Review*, 55(3), 404-416.

³⁹ Neff, R., & Cooper, K. (2004). Parental conflict resolution: Six-, twelve-, and fifteen-month follow-ups of a high-conflict program. *Family Court Review*, 42, 99-114.

- (a) *Family law' issues*: These include the emotional, economic, and other disruptive stresses of separation and divorce, and the legal and other processes employed to manage or resolve the issues generated as a result of the separation.
- (b) *Ideological beliefs, attitudes, and values*: Separation frequently throws differences in these areas into sharp relief. Differences that were tolerated or even found attractive by a partner during the relationship may become a source of irritation and part of the post-separation battleground, especially with respect to making decisions about children.
- (c) *Family violence and abuse*: This covers a broad range of (unfortunately common) separation-related behaviours. Though never acceptable, some violence can be reactive in nature. Violence that is more entrenched is most likely to stem from a sense of entitlement – more often though not exclusively male initiated – which adds to the challenge of resolving or managing the conflict.
- (d) *Mental health issues*: This covers a broad range of behaviours. Some are linked to conventional diagnostic categories, while others are more contested. Some are thought to be enduring problems, often linked to genetic factors, while others appear to be more intermittent and more environmentally determined.
- (e) *Substance and alcohol abuse, and other addictive behaviours*: These behaviours may be a significant cause or product of the separation and divorce process.

We hasten to add that identifying and working with interparental hatred does not relieve family law professionals of their obligations to prioritize safety and to ensure the protection of children and parents. For Smyth and Moloney, safety must always be given primacy over other destructive dynamics – including deeply entrenched hatred.⁴⁰

Like others,⁴¹ Smyth and Moloney have suggested that the term “high conflict” oversimplifies the nature of destructive family dynamics, especially with respect to the small but resource-intensive group of separated parents who remain deeply enmeshed in legal battles and parental acrimony. We would suggest that the complexity of these cases require specialist forensic investigation by the court. For such cases, we therefore wonder whether it’s time to move beyond the standard format of Family Reports, with their key emphasis on decisions about parenting arrangements. For such cases we wonder whether family law should now be more formally incorporating specialists in mental health as well as those working with both men and women in the area of serious family dysfunction.

Mediation and other facilitated or therapeutic processes can usually assist these families. And as noted, even modest changes in the percentage of those assisted can have a significant impact on resources. But such processes need to be safe. Safety can only be maximised, however, after proper forensic assessment. For more than 20 years, significant family dysfunction, including violence and abuse, have come to be recognised as ‘core business’ in family law disputes. However, based on an original model of ‘no fault’ and private disputes, family law has struggled to come to terms with these developments. Traditionally, family dysfunction, family violence and child protection have been seen as concerns of the States.

⁴⁰ See above n 38.

⁴¹ e.g., Demby, S. (2009). Interparental hatred and its impact on parenting: Assessment in forensic custody evaluations. *Psychoanalytic Inquiry*, 29, 477–490; Demby, S. (2017). Commentary on entrenched postseparation parenting disputes: The role of interparental hatred. *Family Court Review*, 55(3), 417–423.

With respect to these cases, we think that family law is at a turning point. One direction is to have cases like this dealt with by the States. The other direction is for family law to formally incorporate quality forensic services into its system.

Reference (i): Any improvements to the interaction between the family law system and the child support system

While the family is generally thought of as a haven far removed from the workings of a market economy, according to Millman, it ‘often edges into an economy of exchange’ – albeit with a darker underbelly – in which many of the hidden qualities of the market, such as coercion, brinkmanship, competition, tally sheets, and conditional exchanges, come into play.⁴² One of Millman’s fundamental insights is that money is often used as a surrogate measure of love. She reminds us that money is tangible, concrete, measurable, objective, definite, and precise, whereas love is ambiguous, unmeasurable, and often ephemeral. As a consequence of these diametrically contrasting qualities, money is frequently used to gauge relationships. Money has a way of clarifying personal relationships, and can be a symbol for many things beyond its value as cash. It can signify trust, desire, love, control, power, commitment, responsibility, and ownership. For instance, after relationship breakdown, money can be a symbol of continuing love for a child when love no longer exists between former partners.

For Millman, love and money form the two core ‘pre-occupations’ of modern society.⁴³ Both are tightly intertwined because money ‘inevitably seeps’ into all close relationships.⁴⁴ An ‘intricate economy of love and money’ exists in the family, writes Millman.⁴⁵ Relationship breakdown often illuminates this economy. Child support is a case in point.

Not surprisingly perhaps given the complex relationship between love and money, child support policy is an area fraught with high personal emotion for many separating parents and family members. This area of policy is typically tempered by a litany of stakeholders, interest groups, perspectives, anecdotes, and competing interpretations of what’s going on. For many separated parents, child support continues to act as a ‘lightning rod’ for much pent-up anger, grief and disappointment surrounding relationship breakdown (including court outcomes) and the loss of everyday family life.⁴⁶

The Australian Child Support Scheme is complex and involves a myriad of interlocking and competing principles that may not be well understood, even by those with first-hand experience of it.

A perennial issue that has dogged the Scheme since its implementation in the late ‘80s is the apparent inequity of being able to enforce child support or child

⁴² Millman, M. (1991). *Warm hearts & cold cash: the intimate dynamics of families and money*. NY: The Free Press, at 9.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid, at 10.

⁴⁶ This insight was provided two decades ago by the Joint Select Committee on Child Support JSC 1994: 11. This statement still holds true today.

maintenance orders but not parenting orders (yet another example of the intricate economy of love and money). This issue has been – and continues to be – a thorny one for many countries around the world. The Family Law Council wrote a report on *Child Contact Orders: Enforcement and Penalties* in 1998, and it is not clear that much ground has been made since Council's report.

Three – somewhat obvious – points need to be made. First, legislating tangible commodities is clearly easier than legislating cooperative relationships. Second, the fundamental problem for parenting time enforcement initiatives is that punishing a parent inevitably means punishing children. Third, there are two sides to every story; emotionally-bonded relationships are complex. High conflict situations, and high conflict personalities, require substantial forensic and therapeutic resources. The Australian family law system is one of the most coordinated, developed and integrated systems in the world but – again we note – there are financial limits to the extent that Courts have the forensic resources to deal with some of the hardest and most complex cases.

For us, a more pressing issue in the context of child support policy is that the current administrative assessment formula needs to be re-visited, particularly updating the costs of children table.

On the latter point, one of the Ministerial Taskforce's key conclusions remains particularly relevant today:

At the heart of the currency of the child support system is its capacity to respond to social change. Equally, it must respond to legislative change. Alterations to social security, tax or other legislation impacting on social policy may change the operation of the formula, creating undesired outcomes The formula must be monitored to ensure it keeps pace with these changes.

Much has changed in the policy and economic landscape since the child support changes were introduced between 2006 and 2008.

Reference (k): Any related matters

Couple relationship education

Is modern throwaway culture spilling into relationships? Smyth, Hunter, Macvean, Walter and Higgins recently suggested that there is a plethora of relationship and parenting support services available for separating families in Australia. The breadth and depth of these programs, they argued, reflect governments' focus on child wellbeing at the critical juncture of parental separation.⁴⁷ This focus suggests that policymakers in Australia subscribe to a 'back-end loaded' model of family life education (more colloquially referred to as the 'ambulance-at-the-bottom-of-the-cliff' model, as opposed to the 'construction-of-a-good-fence-at-the cliff-top' model – i.e., prevention and early

⁴⁷ van Acker, E. (2008). *Governments and Marriage Education Policy: Perspectives from the UK, Australia and the US*. Hampshire: Palgrave Macmillan.

intervention).⁴⁸

Couple Relationship Education (CRE) appears to be languishing in Australia, apart from the continuation of a small number of mainly religious-based pre-nuptial programs, and the use by those who are separating or contemplating separation – many of whom now make use of community-based family and relationship support services. There has been little high-quality, rigorous assessment of the effectiveness of these programs in Australia, particularly in the long-term. This is also true of educational programs in schools to foster respectful relationships.

In striking contrast, a vast array of parenting education programs – especially in the area of post-separation parenting – has been implemented across Australia. Some are local initiatives, while others have been developed overseas and adapted to local conditions. According to Macvean, over the past 15 years, 129 Australian parenting education programs have been evaluated – with around one quarter recently assessed as having a “Well Supported” (3%) or “Supported” (21%) evidence base.⁴⁹

In line with Smyth et al.,⁵⁰ the authors of the present submission believe that a nationally coordinated policy agenda, with adequate funding, focusing on early intervention and prevention of issues at key life-stage transitions is urgently needed. Further to this, income redistribution policies could reduce financial stress on vulnerable families, and family-friendly work practices and policies are needed to ease work/life stress to allow more time for high quality relationship time. Using existing place-based initiatives that include active consultation with, and engagement of, local communities, to deliver appropriate evidence-based practices and programs may also be effective in improving outcomes for families. In addition, there is emerging evidence that embedding programs within other evidence-based programs of interest to couples (e.g., antenatal/parenting programs) may be helpful.

The Australian story of couple relationship education has been characterized by a general lack of public interest, largely uncoordinated expenditures of energy and resources, and an absence of political consensus for supporting programs designed to enrich couple relationships before major problems develop. At the same time there have been promising developments in the conceptualization, delivery and evaluation of parenting education programs. The marked disparity between progress in these two highly complementary endeavors is puzzling given that the enrichment and strengthening of couple relationships have implications for parenting. Addressing this disparity remains a key challenge for policymakers, service providers and researchers into the future.⁵¹

Research and evidence

In this submission, we have sought to provide the most recent and best available research on the issues before the Committee. In particular, our submission has focused on those issues that relate to the prevalence of false allegations of abuse and neglect in

⁴⁸ This section draws heavily on: Smyth, B. M., Hunter, C., Macvean, M., Walter, M., & Higgins, D. J. (2018). Education for family life in Australia. In *Global perspectives on family life education* (pp. 93-113). NY: Springer.

⁴⁹ See Macvean: <https://www.parentingrc.org.au/publications/review-of-the-evidence-on-parenting-interventions-in-australia/>

⁵⁰ Smyth et al, see above n 48.

⁵¹ Smyth et al, see above n 48.

family law proceedings. What is clear is that there is a general paucity of rigorous and methodologically sound international research on this topic and none in the Australian context. Consequently, in this area of family law, anecdote appears to have indeed reigned supreme and this can be to the significant detriment of effective policy development.

It is our view that the prevalence and nature of false allegations in Australia, in particular malicious allegations in the context of family law disputes, must be the subject of high-quality and methodologically rigorous research.

Epilogue

We wish the Joint Select Committee every success with its work, and would be happy to meet in person to discuss any of the material raised in our submission and/or to provide any relevant data where available.